CIMACO READYMIX SDN. BHD.

v.

L. HONG ENTERPRISE SDN. BHD.

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 22-57-90]
28 JANUARY 1992

CIVIL PROCEDURE: *Summary Judgment - Counterclaim - For goods sold and delivered - Whether triable issues raised in the defence - Evidence of existence of settlement and compromise - Whether defendant estopped from counterclaim.*

The writ of summons taken out by the plaintiff, carried a claim for a sum of RM165,839 interests and costs for goods sold and delivered by the plaintiff to the defendant. The statement of defence and counter-claim was filed by the defendant followed by an application for summary judgment on 17 August 1990. Defence to the counterclaim was filed on 24 August 1990. On 6 November 1990 the learned SAR gave summary judgment for the plaintiff. The defendant appealed and the appeal was heard in open Court.

The issue before the Court was whether there were triable issues raised in the statement of defence and the counter-claim.

Held:

[1] As the statement of claim now stands, the claim is for goods sold and delivered. The defence is that the concrete supplied on the day in question was of lower quality. That is not a sham defence. There is sufficient evidence to support this contention. The 'settlement' or 'compromise' and the rebate of RM50,000 infact given by the plaintiff also supports this contention. So, whether the concrete supplied on that particular day was of lower quality is a triable issue.

[2] Eventhough in the statement of claim the plaintiff made no mention of it, it is now admitted that a "settlement" or "compromise" was reached between the parties. The dispute is whether there are two or three terms to the "settlement" or "compromise". This again is a triable issue.

[3] It is also a triable issue whether the plaintiff is estopped from claiming for goods sold and delivered and whether the defendant is equally estopped from making a counterclaim for damages in view of the "settlement" or "compromise"

[4] The other defence put up was the misrepresentation of the plaintiff that the plaintiff would not enforce payment in full and that the defendant would be afforded every reasonable opportunity to rectify any irregularity. Upon that promise the defendant accepted the "settlement" and made various payments which were accepted by the plaintiff. This is a question of fact, which can only be decided after the trial.

[Appeal allowed.]

For the plaintiff/respondent - Lian Siew Ling; M/s. Murad & Foo
For the defendant/appellant - Ooi Teik Hoe; M/s. Ooi, Lee & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

On 22 February 1990 the plaintiff took out a writ of summons against the defendant. The plaintiff claimed against the defendant for a sum of RM165,839 interests and costs, for goods sold and delivered by the plaintiff to the defendant.

On 11 August 1990, the defendant filed a very lengthy statement of defence and counter-claim.

On 17 August 1990 the plaintiff filed a summons-in-chambers praying for summary judgment.

Defence to counter-claim was filed on 24 August 1990.

On 6 November 1990 the Senior Assistant Registrar gave summary judgment for the plaintiff. The defendant appealed. At the request of both parties the appeal to me was heard in open Court straight away.

In brief the defence was that, first, the material (ready mixed concrete) was not according to specifications required and of lower grade. Secondly, there was settlement reached in July 1988 whereby:

(a) Plaintiff agrees to give a rebate of RM50,000 as a discount;

(b) At plaintiff's request it was verbally agreed that plaintiff will allow defendant to settle the outstanding amount owing by payment of RM2,000 to RM3,000 per month until full settlement and more if defendant secure other large projects;

(c) Defendant will not make further claims for loss and damages as a result of plaintiff's supply of the defective cement.

Pursuant to that settlement, the plaintiff gave a rebate of RM50,000 and the defendant paid various amounts totalling RM19,000. The defendant therefore, contended that the plaintiff was estopped from suing on the original contract. Thirdly, there was a misrepresentation by the then Manager of the plaintiff company which was acted upon by the defendant. The defendant also counter-claimed for damages.

Defence to counter-claim was filed on 24 August 1990. It is interesting to note that the plaintiff now admitted that there was a "compromise". However, the plaintiff contended that there were only two terms to the "compromise" that is (a) and (c). The plaintiff however denied that they ever agreed to (b) that is that the defendant be allowed to settle the balance sum by instalment payments. In the alternative, the plaintiff said that the defendant had failed to pay the instalments as agreed. The plaintiff also said that the defendant was estopped from making a counter-claim.

In the course of her argument, learned Counsel for the plaintiff confirmed the plaintiff's stand that there were only two terms to the "compromise". However, she said that if the Court were to hold that there were three, the plaintiff would accept it.

I am of the view that there are triable issues in this case.

First, as the statement of claim now stands, the claim is for goods sold and delivered. The defence, *inter alia,* is that the concrete supplied on the day in question, was of lower quality. That is not a sham defence. There is sufficient evidence to support this contention. The "settlement" or "compromise" and the rebate of RM50,000 in fact given by the plaintiff also supports this contention. So, whether the concrete supplied on that particular day was of lower quality is clearly a triable issue.

Secondly, even though, in the statement of claim, the plaintiff made no mention of it, it is now admitted that a "settlement" or "compromise" was reached between the parties. However, the dispute is whether there are two or three terms to the "settlement" or "compromise". This again is a triable issue.

Thirdly, it is also a triable issue whether the plaintiff is estopped from claiming for goods sold and delivered and whether the defendant is equally estopped from making a counter-claim for damages, in view of the "settlement" or "compromise".

The other defence put up was the misrepresentation by Encik Adnan bin Abu Bakar, the Manager of the plaintiff company that the plaintiff would not enforce payment in full and that the defendant would be afforded every reasonable opportunity to rectify any irregularity. It was upon that promise, according to the defendant, that the defendant accepted the "settlement" and made various payments which were accepted by the plaintiff. This is a question of fact which can only be decided after a trial.

As in my view there are obviously triable issues in this case, a summary judgment should not have been given. For these reasons I allowed the appeal with costs.

Also found at [1992] 1 CLJ 667